Supreme Court, U.S.
FILED
FEB 9 1999
CLERK

(4)

No. 98-1071

In The
SUPREME COURT OF THE UNITED STATES
October Term 1998

CENTRAL STATE UNIVERSITY,

Petitioner,

v.

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, CENTRAL STATE UNIVERSITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITIONER'S REPLY BRIEF

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
DAVID M. GORMLEY
Assistant Attorney General
Counsel of Record
JAN ALAN NEIGER
Assistant Attorney General
30 E. Broad St., 17th Floor
Columbus, OH 43215-3428
(614) 644-7250
Counsel for Petitioner

898

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

CASES **Page**

Federal Communications Comm'n. v. Beach Communications, Inc., 508 U.S. 307 (1993).....5
Heller v. Doe, 509 U.S. 312 (1993) 3
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 4,5
Nordlinger v. Hahn, 505 U.S. 1 (1992) 5
Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n, 117 S. Ct. 1174 (1997).....4,5
Vance v. Bradley, 440 U.S. 93 (1979) 3

STATUTORY AUTHORITIES

Ohio Rev. Code 3345.45 1,2

ARGUMENT

As we explained in our petition for certiorari, this case involves an egregious misapplication of well-settled equal protection jurisprudence. The Ohio Supreme Court's error is especially pernicious because it prevents the State's legislature from addressing a serious problem affecting higher education in the State and the nation as a whole: the declining amount of time devoted by university faculty to teaching, instead of research, at the undergraduate level. The legislature responded to this problem by directing the State's public universities to adopt "faculty workload policies" that would require professors to spend more time in the classroom. This law is a plainly rational effort aimed at what the court below agreed is a legitimate governmental objective, Pet. App. at A10,—improving the quality of public higher education for undergraduates in the State—and yet, that court by a 4-3 vote inexplicably held that the law was not rationally related to this legitimate state purpose.

1. The lower court's obvious error appears to rest on a faulty premise that the statute somehow blames collective bargaining for the decline in undergraduate teaching. Pet. App. at A12. To be absolutely clear, however, the law in question does *not* apply only to universities whose faculties are subject to collective bargaining agreements. On the contrary, the obligation to adopt a new faculty workload policy applies *equally to all public universities in the State*, many of which employ non-unionized professors. Ohio Rev. Code 3345.45, reprinted at Pet. at 1-2. These non-union schools, just like Central State University, must develop faculty workload policies designed to achieve the same increase in classroom teaching time. The legislature quite rationally and appropriately sought to boost the commitment to undergraduate teaching at *all* public universities—whether their faculties were unionized or not—by imposing the new

workload policies to achieve consistency among the State's public universities.

To be sure, the law specifically says that a new faculty workload policy "prevails over any conflicting provisions of any collective bargaining agreement." *Id.* But this provision does not target collective bargaining agreements for adverse treatment, nor does it put a special burden on schools with unionized faculty. Instead, the new faculty workload policies supersede and preempt *any* contrary employment contracts that professors might have with public universities concerning their workloads. Nonetheless, there is no doubt that the legislature rationally could believe that there would be a greater risk that unionized faculties might attempt to undo the new workload policies through their bargaining power. Consequently, the legislature wanted to make abundantly clear that in the event of such a conflict, the new faculty workload policy is to prevail over any inconsistent collective bargaining agreement.

This decision—that universities with collective bargaining agreements are not exempt from the new workload requirement—in no way can be construed as a legislative judgment that collective bargaining was somehow responsible for the decline in teaching relative to research. Thus, Respondent's assertion, *see* Op. at 5, 10, 12, that evidence was presented showing that faculties with collective bargaining worked more than faculties without is simply inapposite. The legislature was trying to increase the commitment to teaching at *all* public universities, whether their faculties were unionized or not. Respondent's misunderstanding of the relevant issue, in any event, infects its brief in opposition. But this misunderstanding in no way should prevent this Court from correcting the State supreme court's patently inappropriate intrusion upon the legitimate policymaking function of the legislature.

2. The majority below and Respondent maintain as well that it was irrational for the legislature to impose a workload policy requirement only on university professors rather than any other category of public employees. *See* Op. at 3. This argument, to be blunt, is preposterous. The Equal Protection Clause in no way requires States to pass laws—and impose burdens—that are entirely unrelated to the particular evils a State is seeking to redress, but rather permits States to advance their rational ends "even where there is an imperfect fit between the means and ends" resulting in some inequality. *Heller v. Doe*, 509 U.S. 312, 321 (1993). For the same reason, a State need not impose workload policies on any category of employees except the one that the State believes is performing inadequately. This is true whether the one category of public employee that the State finds delinquent is police officers or university professors.

The law at issue applies only to university professors—and not other public employees such as police officers or firefighters—because only university professors are engaged in undergraduate teaching, and it is specifically the decline in undergraduate teaching that the legislature sought to redress. Indeed, given the legislature's objective, it would have been irrational to *include* any other category of employee within the scope of the new workload policy. But precisely because professors were spending too much time on research and not enough time in the classroom, it was entirely rational to impose the new workload policy on them and them alone. While this may be an unwise legislative choice, it is abundantly clear that, "absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

Moreover, it was *only rational* for the legislature to make sure that any collective bargaining agreements then in force would not interfere with the mandate to increase classroom teaching time. In doing so, the legislature did not unconstitutionally discriminate against one group of unionized state workers. Instead, the legislature permissibly addressed the evil at hand. The contrary concern of the majority below, which deprives the legislature of the authority to make this legitimate policy judgment, cannot be permitted to stand uncorrected.

3. Before striking the law, the court searched for hard evidence that collective bargaining had *caused* the decline in teaching. Pet. App. at A12. That approach—a backward-looking one about past causes and effects—asks the wrong question, for the law at issue, like nearly all legislation, is a forward-looking attempt to "ameliorate a perceived evil," *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981), using the legislature's best "predictive judgments" of the impact of its actions, *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n.*, 117 S. Ct. 1174, 1189 (1997),—or even "rational speculation," *Heller*, 509 U.S. at 320—regardless of how the perceived evil arose in the past. Weighing the challenged law in light of "how we got here" rather than whether the law could conceivably "get us where we want to be" in the future, the court turned rational basis scrutiny into a searching examination for evidence. That approach is simply wrong. *See Clover Leaf Creamery Co.*, 449 U.S. at 464 (where "the question [of a law's rationality] is at least debatable . . . litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken").

In pointing to a purported lack of evidence in the record, *see* Op. at 5, 12, Respondent has fallen into the same trap as the Ohio Supreme Court, which likewise parsed

through at least a half-dozen lengthy reports cited in the opinion, most of which were prepared by the legislature or by other State officials. Pet. App. at A12. Though courts owe legislative "findings deference in part because the [legislature] is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions," *Turner Broadcasting Sys.*, 117 S. Ct. at 1189 (quotations omitted), and despite this Court's directive that "the absence of 'legislative facts' explaining [a law's] distinction[s] . . . has no significance in rational-basis analysis," *Federal Communications Comm'n. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (citation and quotations omitted), the court below plowed ahead, analyzing these various statistical studies about teaching, research and collective bargaining and said, after doing so, that the Ohio law could not stand. Pet. App. at A12-A15.

This Court need look no further than page three of the brief in opposition to see that the Ohio Supreme Court "erred in substituting its judgment for that of the legislature." *Clover Leaf Creamery Co.*, 449 U.S. at 469. The Respondents themselves prove the rationality of the law's means-end fit by noting there that as soon as the law was implemented, faculty time in the classroom went up at Central State—the very result the legislature hoped to achieve. Op. at 3. Even without that irrefutable evidence of the swift effectiveness of the legislature's effort to reach the stated goal of this law, the court below surely went far astray when it said in essence that "the relationship of the classification to its goal is . . . so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).

4. The lower court's decision is so obviously a misapplication of settled equal protection law that it warrants summary reversal. We are aware that summary reversal is an extraordinary measure to be used only in the rarest of cases,

but we firmly believe that this case falls within that extraordinary category. The decision of the Ohio Supreme Court was so patently erroneous, and the potential consequences to the improvement of undergraduate teaching in Ohio and elsewhere are so devastating, that this Court cannot allow the state court's misguided interference with reasonable legislative policy to remain uncorrected.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court to grant the writ and order the reinstatement of the trial court's decision.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio

EDWARD B. FOLEY
State Solicitor
DAVID M. GORMLEY
Assistant Attorney General
Counsel of Record
JAN ALAN NEIGER
Assistant Attorney General
30 E. Broad St., 17th Floor
Columbus, OH 43215-3428
(614) 644-7250

Counsel for Petitioner

Date: February 8, 1999